

<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 1 of 11</b>
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#### **Committee Members Present**

Captain Robert Carr, Committee Chair  
 Captain Oscar Prada, Commissioner  
 Karen Tynan, Commissioner

#### **Committee Members Absent**

None.

#### **Board Staff Present**

Allen Garfinkle, Executive Director  
 Dennis Eagan, Board Counsel  
 Brenda Pugh, Staff Services Manager I  
 Alethea Wong, Administrative Assistant II

#### **Identified Public Present**

Captain John Carlier, San Francisco Bar Pilots (SFBP) President and Port Agent; Captain Anne McIntyre, SFBP Business Director; Captains Dylan Epperson, Eric Robinson, and Nicholas Deisher, SFBP; Mike Jacob, Pacific Merchant Shipping Association (PMSA) Vice President and General Counsel; Jennifer Schmid, Vice President; Captain Einar Nyborg, Commissioner; and Luis Cruz.

#### **OPEN MEETING AGENDA**

##### **1. Call to Order and Roll Call. (Chair Carr)**

Committee Chair Carr called the meeting to order at 1:33 p.m. Administrative Assistant II Wong called the roll and confirmed the quorum.

##### **2. Review and approval of the minutes for the Ad Hoc Committee to Review the Pilotage Rate Setting Process meetings held on June 8, 2021, July 13, 2021, and August 4, 2021. (Chair Carr)**

The Committee members were presented with the draft meeting minutes from June 8, 2021. Executive Director Garfinkle reported that Board staff received edits to the minutes from Committee Chair Carr and Board Counsel Eagan.

Committee Chair Carr wanted the draft minutes to include the discussion regarding Mr. Jacob's support of the process to include automatic adjusters, which will limit the frequency for a rate hearing. Commissioner Tynan agreed and confirmed the discussion. Mr. Jacob

<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 2 of 11</b>
--	---	---------------------

noted that the minutes include the appropriate language regarding the discussion. Commissioner Tynan agreed with the added language to the draft minutes.

Executive Director Garfinkle commented that he has not confirmed with the California State Transportation Agency (CalSTA), if Agency can participate as a decisionmaker, therefore he removed his comment from the draft minutes.

**MOTION:** Commissioner Tynan moved to approve the draft minutes of the meeting held on June 8, 2021, as amended. Commissioner Prada seconded the motion.

**VOTE:** YES: Carr, Prada, and Tynan.  
NO: None.  
ABSTAIN: None.

**ACTION:** The motion was approved.

Committee members were presented with the draft minutes from the July 13, 2021, meeting. Board Counsel Eagan and Mr. Jacob requested for minor edits to the minutes.

**MOTION:** Committee Chair Captain Carr moved to approve the draft minutes of the meeting held on July 13, 2021, as amended. Commissioner Tynan seconded the motion.

**VOTE:** YES: Carr, Prada, and Tynan.  
NO: None.  
ABSTAIN: None.

**ACTION:** The motion was approved.

### 3. **Public comment on matters on the agenda or not on the agenda.**

There were no public comments.

### 4. **Identify, Discuss, and review various rate setting options. The committee will draw from rate setting methodologies in use in other jurisdictions, methodologies historically used in this jurisdiction, or a hybrid of both. The committee will evaluate each option based on feasibility of implementation and determine whether it meets with the objective of committee's mission within the established timeline goal. (Chair Carr)**

Committee Chair Captain Carr noted that the agenda items were kept the same from the last Committee meeting, and the Committee has now completed the data gathering stage and is ready to start formulating a recommendation to the Board.

<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 3 of 11</b>
--	---	---------------------

The Committee reviewed the issues identified that led to the formation of the Ad Hoc Committee to Review the Pilotage Rate Setting Process:

- PMSA and SFBP agree that the current rate-setting process is not effective. The issues increased during the pandemic and the Board was unable to respond.
- The current process has weaknesses when evaluating evidence.
- PMSA has expressed their lack of confidence in the integrity and the objectivity of the process.
- The process through the Legislature is lengthy, and follows the Legislature's calendar, requires the partis to find a Legislator to sponsor the bill, and may lead to political influence.

Committee Chair Captain Carr suggested having a flowchart to help the Committee organize the ideas and possible recommendations. The Committee members agreed that an administrative law judge should be included in the rate-setting process.

Commissioner Tynan suggested to answer the following:

- Identify the Board's involvement.
- Initiations of the process.
- How streamlined and robust the process should be before presenting to the Board.

Executive Director Garfinkle noted that currently a petition is initiated by any party who is affected by the pilotage rates. The Board has 10 days to respond to a petition filed by a party directly affected by pilotage rates. The Board shall provide notice of a public hearing. SFBP Business Director Captain McIntyre reported that in Oregon, process is less formal and parties notify the Board of their intent to file a petition.

The Committee agreed on the following:

- Any party affected by the pilotage rate may file a petition to the Board.
- Have a pre-conference hearing to start discussions and possibly negotiations.

Commissioner Prada commented that it is ideal to have the process as clear as possible to avoid having a rate hearing to frequently.

Board Counsel Eagan noted that in his previous experience, there is a tight timeline during the rate hearing process. He noted that the pre-petition period can be beneficial allowing all parties the opportunity to discuss and narrow the issues prior a rate hearing where there are deadlines to comply with. Board Counsel Eagan responded to Commissioner Tynan that 30 calendar days, which consists about 20 business days seems to be a reasonable timeline for the pre-petition, and if it's longer, the party members may result in procrastination. Executive Director Garfinkle

<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 4 of 11</b>
--	---	---------------------

added that the statutes state that the Board must provide a 10-day notice of the rate hearing, and added that once the petition moves into the official stages, the timeline is fixed. Board Counsel Eagan suggested that during the pre-petition period, if the discussion is promoting progress, there should be an opportunity for the parties to extend the pre-petition period to the Board. Executive Director Garfinkle suggested including the language that *during the pre-petition stage, the parties must file an official petition within 30 days unless...*, and he suggested keeping the discussion broad at this time.

Commissioner Tynan commented that the pre-petition notice gives the public notice and offers transparency. Executive Director Garfinkle added how a pre-petition if initiated needs to be clarified.

SFBP Business Director Captain McIntyre reported that in the Oregon, the pre-petition process is a shortened version where petitions are filed with evidence to support the petition, and the ALJ reviews everything.

Commissioner Tynan suggested that if no agreement or progress made within the 30 days, then an official petition is filed.

Mr. Jacob clarified that in the past, parties would spend months discussing, prior to a formal petition was filed. He added that if a notice of intent to file was completed without discussions, then no negotiations have been attempted prior to this. However, as a procedural process, the notice of intent to file is beneficial to Board staff so that Board staff can start preparations, such as contacting the Office of Administrative Hearings to have an ALJ assigned to the Board. He added that, currently, the conclusion of the rate hearing is dependent upon the Legislature's calendar, but if the Legislature were to be removed from the process, then the duration for the Legislature to approve the bill and become effective is also removed. He suggested to include only the notice of intent to file, and not to include terms during the pre-petition phase. He agrees with Commissioner Tynan's suggestion of having a pre-hearing conference if there were contested issues.

Mr. Jacob doesn't see a need for the Board to limit petitions for rate hearings to certain times of the year, and it seems appropriate to be open to allowing petitions when there is a need for one. SFBP Business Director Captain McIntyre sees the flexibility as a positive feature, but still needs to have an implementation schedule for any reason.

SFBP Business Director Captain McIntyre responded to Mr. Jacob that during the pre-petition phase, the Rate Subcommittee would meet and the public Board members would attempt to help with the negotiations to reach a consensus.

<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 5 of 11</b>
--	---	---------------------

Commissioner Tynan commented that for prepetition activities, the goal would be a stipulated agreement.

Executive Director Garfinkle clarified that the other phases of a rate action, post-prehearing, are still valid and provide transparency and an evidence-based trail. He further added that the stipulated agreement is not the final process, but the process is easier when the issues are narrowed.

Board Counsel Eagan added that normally, a stipulated agreement is not the conclusion, and it contains an agreement of facts that the parties support and justify the ultimate resolution to the issue involved. The Board can then decide if the stipulated agreement is beneficial to the public. The agreed-to facts will make the decision making transparent to the public. He also added that if there is a complaint, the parties must participate at the full hearing.

Board Counsel Eagan stated that there must include, at the very least, minimal evidence in support of the claims made in the petition, even if the other party does not contest. There is a public recitation of the factual and policy basis to further the agreement. It's not enough for the evidence and agreement be presented and have the Board to approve it without supporting facts.

SFBP Business Director Captain McIntyre confirmed that the pre-petition notice in Oregon triggered the Rate Subcommittee at the Board, and the subcommittee consisted of three public members to help mediate and reach an agreement.

Mr. Jacob wanted the Committee to focus on the following:

- What are the obligations to file a petition.
- What are the processes for alternative resolutions and issues, to be filed and be built into the process.

He emphasized the importance for everyone affected to have an opportunity to provide input, and the opportunity to discuss and find resolutions when information is not as forthcoming.

Board Counsel Eagan commented that the public presentation before the Board should consist of of a stipulated set of facts which justifies the proposed rate adjustment. Some may come before the Board and present additional facts, such as an economist. It may be helpful having a expert witness who is familiar with the factual support and makes a presentation. Having a subject matter expert available will promote confidence and transparency, particularly if Board members are able to ask questions, rather than simply reviewing available materials. He added that involving an ALJ during this phase is not particularly necessary, as there is no ruling on the evidence (unless there needs to be a ruling at a contested hearing). He emphasized that there

<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 6 of 11</b>
--	---	---------------------

should be an opportunity for public comment, and clarified that an ALJ serves as a referee and adjudicate issues as they arise during the administrative hearing.

Commissioner Tynan summarized the issues discussed thus far:

- Parties that agree to a rate stipulation
- Notice to the Board
- Board report with an agenda item
- Open to the public for approval of the rate stipulation
- A presentation of the foundational basis for the stipulation with facts supporting the stipulation
- Any other issues requested by the Board and have the opportunity for public comment.

Committee Chair Captain Carr commented a presentation at the Board meeting doesn't offer the 30-60 days comment period to the public. Mike Jacob reminded the Committee that others should continue to have the opportunity to voice their concerns since he is unable to represent all other ratepayers, and is the same the other way around. A stipulated agreement doesn't mean that there should not be a full process in place. He doesn't believe the process should be truncated by a stipulated agreement between two or more parties.

Board Counsel Eagan offered that if PMSA and SFBP reach an agreement, they present their proposed agreement to the Board and there is a 30-day notice sent to the public and advises the public of the proposal. If someone wants to make a petition or to object, and insist on a contested hearing regarding the proposal, they should have that opportunity.

There was a prolonged discussion of the role of an ALJ in a stipulated agreement versus a non-stipulated agreement.

Executive Director Garfinkle prefers to include an ALJ into the process so that Board staff can focus on other duties. In current regulations, Board staff receive and prepare relevant documents for the rate hearing process.

Board Counsel Eagan noted that in the event of a proposed stipulated agreement, contested or not, having the ALJ review documents can be beneficial. Committee Chair Carr agrees that having an ALJ will be beneficial in reviewing the evidence due to comments that previous rate recommendations were not evidence-based, or the evidence was not properly reviewed.

Commissioner Tynan wants to find the balance between the streamline process and the robust process. If there is a stipulated agreement, the process can move through the channels to reach approval and be implemented without hurdles and without stakeholders or peripheral people, if an agreement has already been made between the main parties. She wants to ensure that the

<p><b>Meeting Date:</b></p> <p><b>August 31, 2021</b></p>	<p><b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b></p> <p><b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b></p>	<p><b>Page 7 of 11</b></p>
---	--	----------------------------

process won't be affected by outliers. She further clarified that the ALJ will have a process to review if there are any stipulations.

Commissioner Nyborg commented that since PMSA is unable to speak for other stakeholders, it is important to include the other stakeholders at the beginning of the process, and that it is more beneficial when there is a stipulated agreement, and the third parties also have a say in it.

Mike Jacob suggested not to use the term *stipulated agreement* because it is creating confusion. The question really is what the process is leading up to a hearing. During negotiations, parties will try to find solutions for an agreement, the petition is filed and is assigned to an ALJ. There is a period to receive complaints, but there aren't any because they have been addressed early in the process, therefore the ALJ holds an uncontested hearing based on the established guidelines. The final decisionmaker reviews the recommendations for implementation. This is generally the process in Washington, Hawaii, and Oregon.

When there are instances of contested hearings, which are longer and more complex, these are still accommodated in Washington, Oregon, and Hawaii's processes. All the systems are set up to have a basic petition and an intervention process. If all parties can agree early in advance, then it will lead to an uncontested hearing. The Committee may be making the issue more complex than necessary.

Mr. Jacob responded to Commissioner Prada's question, that in the past he has not represented other industry members and spoken on their behalf, but recently in Washington regarding the new utilities and transportation commission (UTC) process, Mr. Jacob noted that neither the Cruise Lines International Association (CLIA) or the Western States Petroleum Association (WSPA) intervened as a party. PMSA and the Pacific Yacht Management, on behalf of recreational vessels, were concerned about the rate changes and were the industry voices to intervene as parties.

Commissioner Prada wanted to know if there are rate tiers or structures in which certain types of vessels are charged more, and vessels that are preferred, such as vessels that emit cleaner emissions are offered a lower rate. Mr. Jacob noted that the Port of Los Angeles has a rate system that is similar to Commissioner Prada's description, and that certain rate charges did not get adopted due to international standards. Mr. Jacob finds it difficult to justify the need to charge vessels at different rates. Mr. Jacob also added that this implies that certain businesses are favorable than others. Mr. Jacob notes that if there is an appropriate justification to charge a different rate, there may be several who may agree to it, but there may still be someone who disagrees with the different rate.

<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 8 of 11</b>
--	---	---------------------

Commissioner Tynan shared her notes and summarized process to the following:

- Notice of Intent to File Petition (Pre-Petition Notice)
  - Negotiations regarding rate or other stipulations
  - Can have a stipulated rate agreement and file a Joint Petition.
  - Can have a partial stipulation of facts or issues and a file a Joint Petition.
  - What is the Board's role? Other activities?
- Petition for Rate Hearing
  - Joint Petitions are allowed and proper.
  - Petition process starts
  - ALJ requested and assigned
- ALJ Process and Hearing
  - Initial Disclosures, Discovery, and Submissions
  - Prehearing and Settlement Conferences
  - Evidentiary Hearing on Contested Issues.
  - Decision/Findings and Recommendation.

Board Counsel Eagan noted that a contested hearing that follows the procedures used by other agencies contains a proposed decision prepared by the ALJ. The ALJ does not make a final decision, but makes a recommended proposed decision, broken down into the findings of facts, conclusions of law, and presents the ultimate action to the Board, who may then accept the proposal and to what extent (with possible changes), and the final decision was usually with the Board, not the ALJ. The ALJ can sit with the Board and discuss the recommended proposed decision and provide clarifications.

There may be changes with the decision and he doesn't recall what happens if there were changes to the facts of findings. The simplest form is that the proposal is made and is accepted or rejected, and if it is rejected, the Board will tell the ALJ what issues the Board was concerned with. Should be Board find that the facts to be insufficient, the Board can send the proposal back to the ALJ to redo. Another option is for the Board to be present at the very beginning and listen in on the findings of facts, but this is rarely done at other organizations because it is time consuming. It is more efficient for an ALJ to complete the evidentiary hearing. During recent rate hearings, an ALJ wasn't involved and the Board has participated during the entire rate hearing process from beginning to end, including during the evidences presented and the proposed decision based on the conclusion after the findings of facts, and we sent to the Legislature for approval.

Mr. Jacob noted that the industry is concerned about having the Board be the final decisionmaker. He also clarified that in the 1990s when an ALJ was involved, the Legislature



<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 9 of 11</b>
--	---	---------------------

made the final decision. Executive Director Garfinkle commented that during the entire history so far, the Legislature was the final decisionmaker.

Committee Chair Captain Carr finds that it is important that the Board needs to be involved in making the decision due to the Board having the responsibility to oversee the safety and issues related to the pilots in the San Francisco Bay Area, and surrounding areas. Commissioner Tynan summarized that there seems to be two options that the final decisionmaker can be the Board or the Secretary of the California Transportation Agency (CalSTA).

Executive Director Garfinkle reported that he has not discussed this possibility with Secretary Kim from CalSTA, but has initiated discussions with CalSTA staff, who report to Secretary Kim. He suggested on the possibility of having the ALJ make the final decision, instead of going to the Legislature or the Secretary of CalSTA.

Committee Chair Captain Carr noted that Washington's UTC and California's Public Utilities Commission (PUC) focus on the rates based on the financial impact, and notes that the Board should be also focusing on other issues, not just the financials, due to the Board's knowledge and expertise that cannot be easily conveyed to others. He noted that having the ALJ will be helpful with the fact-finding phase and weighing of the factors. He does not expect the Board to reject the ALJ's recommendation.

Commissioner Tynan commented that the Committee has not specified the Board staff or Board members' roles in the notice of intent to file petition, petition for rate hearing, or the ALJ process and rate hearing processes. Committee Chair Captain Carr commented that he expects Board members and Board staff to be involved in all aspects of the process, even though it is not convenient.

Commissioner Nyborg agrees with Committee Chair Captain Carr and noted that if the process leads to a rate hearing, the Board needs to be heavily involved in the process and have a large "foot-print" on the process.

Commissioner Prada was expecting the ALJ to make the final decision, and it seems unnecessary and a waste of time in having an ALJ, if the Board did not entrust the ALJ to make a fair and objective decision.

Commissioner Tynan commented that at an earlier meeting, she had mentioned that based on the codes regarding governing the Board, the rates, and the pilots, that the legislative intent was for the Board to have involvement in the process and the Committee has not addressed the petition process and the expectation of the Board would be. She doesn't see the Board having its own evidentiary hearing, relying on the ALJ to make findings of facts and conclusions of law, and

<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 10 of 11</b>
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come to a recommendation. At some point, the Secretary of CalSTA or another entity charged with decision making may need to hear from the entities who are most involved with the industry. The Board members are the subject matter experts and are relied upon for this expertise.

Committee Chair Captain Carr noted that one of the main concerns of Washington's UTC is the makeup of the Board. He notes that there are other issues that are not finance-involved that the Board can assist with. Even the process in Washington and Hawaii, the ALJ made recommendations to the regulating entity; therefore he finds it appropriate to handle the ALJ's input in the same manner. He also noted that the ALJ puts in the effort in forming the recommendation, and the Board or regulating entity ensures that the recommendation is appropriate, prior to making the decision. If there are modifications, then there needs to be a good reason. He is open to having another Committee meeting to discuss the role of the Board in more detail, and that it is important to determine who be the final decisionmaker.

Commissioner Prada commented that the Committee has made progress and can meet again to discuss more of the details. The Committee seems to be on the right path but still has more to discuss.

Board Counsel Eagan commented that the Committee still needs to make a formal decision on what the Board's role is. He noted that one of the Committee's concern was to get too detailed but one of the general concerns is what are the standards for the decisionmaker. No decision has been made regarding to changes to the current regulations, which included standards on how to proceed with a rate hearing.

**5. Public comment on matters not on the agenda.**

There were no public comments.

**6. Schedule the next Committee meeting, and proposals for the next Committee meeting agenda.**

Committee Chair Captain Carr announced that the points of discussion will be presented in written format, and the agenda will remain the same for the next Committee meeting with updated discussion points. He requested that the Committee be prepared to discuss the role of the Board at the next Committee meeting.

The Committee agreed that the Committee will next meet on September 14, 2021, at 2:30 p.m.

**7. Adjournment.**

<b>Meeting Date:</b>  <b>August 31, 2021</b>	<b>Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun 660 Davis Street, San Francisco, CA 94111</b>  <b>AD HOC COMMITTEE TO REVIEW THE PILOTAGE RATE SETTING PROCESS MEETING MINUTES</b>	<b>Page 11 of 11</b>
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**MOTION:** Commissioner Tynan moved to adjourn the meeting. Commissioner Prada seconded the motion.

**VOTE:** YES: Carr, Tynan, and Prada.  
NO: None.  
ABSTAIN: None.

**ACTION:** The motion was approved, and the meeting was adjourned at 3:49 p.m.

Submitted by:




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**Allen Garfinkle**  
**Executive Director**

DRAFT